Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Request for Stay Pending Reconsideration by U.S. TelePacific Corp. d/b/a TelePacific Communications	)	WC Docket No. 06-122

JOINT COMMENTS IN SUPPORT OF REQUEST FOR STAY FILED BY U.S. TELEPACIFIC CORP.

BT Americas Inc., on behalf of itself and its U.S. affiliates, ("BT"), Orange Business Services US, Inc. ("Orange"), and BCE Nexxia Corp. ("BCE") (collectively, "Joint Commenters"), by their attorneys, and pursuant to the Public Notice issued in the above-captioned proceeding,[1] hereby file these Comments in support of the request of U.S. TelePacific Corp. d/b/a TelePacific Communications to stay the *2012 Wholesaler-Reseller Clarification Order* (the "Order") pending resolution of its underlying Petition for Partial Reconsideration.[2]

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1 *Wireline Competition Bureau Seeks Comment on a Request for Stay Pending Partial Reconsideration of the* Wholesaler-Reseller Clarification Order *by U.S. TelePacific Corp. d/b/a TelePacific Communications*, Public Notice, WC Docket No. 06-122, DA 12-1997 (rel. Dec. 10, 2012).

2 *See In the Matter of Request for Stay Pending Reconsideration by U.S. TelePacific Corp. d/b/a TelePacific Communications*, WC Docket No. 06-122, Request for Stay Pending Reconsideration (filed Dec. 5, 2012) ("*Request for Stay*"); *In the Matter of Universal Service Contribution Methodology et al.*, WC Docket No. 06-122, Petition for Partial Reconsideration (filed Dec. 5, 2012); *In the Matter of Universal Service Contribution Methodology et al.*, WC Docket No. 06-122, Order (rel. Nov. 5, 2012) ("*2012 Wholesaler-Reseller Clarification Order*").

Joint Commenters support the request for stay for two primary reasons. First, Joint Commenters agree with TelePacific that the Commission should resolve the underlying reconsideration petition prior to implementing the contemplated changes, which have the potential to wreak irreparable harm upon both wholesalers and resellers of a wide array of IP-enabled enterprise services. Second, although TelePacific frames the request for stay as limited "to the extent [the *2012 Wholesaler-Reseller Clarification Order*] requires universal service contribution on the transmission component of broadband Internet access," the harm inflicted by the Order extends to other services—including Multi-Protocol Label Switching ("MPLS")-based services—for which the Commission has not yet clarified contribution obligations. Therefore, the Commission should impose a stay on the *2012 Wholesaler-Reseller Clarification Order* until such time that it has addressed the underlying Petition for Partial Reconsideration, resolved the long-standing uncertainty surrounding the assessability of MPLS-based services, and provided resellers with adequate time to design systems to comply with any new rules.

I. BACKGROUND

Joint Commenters are global communications providers who offer sophisticated IP-enabled services to meet the demands of their customers, which include many large-scale international businesses with sizable footprints in the United States. Among other services, Joint Commenters provide these customers with enterprise data solutions, including managed Internet Protocol Virtual Private Networks ("IP-VPN") using Multi-Protocol Label Switching ("MPLS") technology.[3] To address the skyrocketing demand for these services, Joint Commenters must

[3] MPLS is a sophisticated packet-switching technology—rather than an independent service—that enables internetworking, class of service (CoS) and quality of service (QoS) capabilities, and network management services. *See In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, Ex Parte (filed Mar. 29, 2012) ("MPLS Industry Group Letter") at 3. Among other uses, MPLS technology is employed in the provision of enterprise data solutions, including IP-VPN. IP-VPN

purchase inputs, most often local loops or middle-mile transmission facilities, from wholesale vendors. After executing agreements with these vendors, Joint Commenters remain responsible in most cases for the billing, collection, and customer-facing arrangements. As such, Joint Commenters may contract in a number of ways to incorporate wholesale services into the global suite of enterprise services they provide multinational customers. They may function as systems integrators, resellers, prime contractors for the global delivery of managed services, and/or as agents in arranging for such services. To the extent Joint Commenters are obligated under the Commission's rules to report and pay directly or indirectly universal service fees on U.S. telecommunications services,[4] they have a strong interest in the outcome of the pending Request for Stay.

On December 5, 2012, TelePacific filed its Request for Stay of the *2012 Wholesaler-Reseller Clarification Order* pending resolution of its Petition for Partial Reconsideration of that Order. The Order itself provides that a wholesaler seeking to classify revenues as reseller revenues (also known as "carrier's carrier" revenues) must demonstrate—through certificates consistent with the Form 499-A instructions or "other reliable proof"—that it has a reasonable expectation that each of its customers is in fact a "reseller" as defined in the Order.[5] Further, the Order would require, in most instances, wholesale carriers to treat as end

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services are particularly attractive to large businesses because they "provide[] the functions and features of a private network without the need for dedicated private lines." *See* Letter from Richard A. Belden, USAC, to Julie Veach, Wireline Competition Bureau, FCC, WC Docket Nos. 06-122, 05-337 (filed Aug. 24, 2009) ("2009 Guidance Request").

4 *See 2012 Wholesaler-Reseller Clarification Order* ¶ 3 (defining a reseller as "an entity that (1) incorporates purchased telecommunications into its own service offerings *and* (2) can reasonably be expected to contribute to the Fund based on revenues from those offerings.").

5 *See 2012 Wholesaler-Reseller Clarification Order* ¶ 41.

user revenues (rather than carrier's carrier revenues), revenues received from purchasers of special access circuits used as inputs into broadband Internet access services.[6]

In its Petition for Partial Reconsideration, TelePacific argues that this Order violates Section 254 of the Communications Act of 1934 (as amended), its implementing regulations, and FCC policies regarding nondiscrimination and competitive neutrality to the extent that it imposes USF contribution obligations "on the incumbent local exchange carrier ("ILEC") when the ILEC provides special access circuits to TelePacific as an input to TelePacific's wireline broadband Internet access service—resulting in TelePacific indirectly contributing to the USF in the form of ILEC surcharges," but not "when the ILEC uses its own facilities as an input to the ILEC's wireline broadband Internet access service."[7]

According to TelePacific, a stay is appropriate here because (1) it is likely to succeed on the merits of its Petition for Partial Reconsideration; (2) it will face irreparable harm in the form of lost customers and damaged consumer good will if it is forced to increase prices (or incur sunk costs) associated with USF charges passed through from ILECs; (3) any increased costs would harm consumers because it will inflict both higher prices for services and decreased choice in the marketplace; and (4) a stay would advance the public interest by promoting competition and national broadband deployment.[8]

Joint Commenters agree with TelePacific that the Commission should stay implementation of the *2012 Wholesaler-Reseller Clarification Order*. First, the threats of lost customers and damaged consumer good will are as real as they are grave, and together they provide sufficient reason to grant a stay. Second, the irreparable harm is only magnified when

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6 *See id.* ¶ 40 n.111.

7 *See Petition for Partial Reconsideration* at 3.

8 *See Request for Stay* at 10-15.

the Commission considers the effect upon MPLS-based services, which face continued uncertainty with respect to contribution obligations and are the subject of a pending *FNPRM* and numerous requests for clarification.[9] Absent clarification from the Commission and ample lead-time to effectuate the system-wide, service-by-service analysis contemplated by the Order, providers who purchase telecommunications inputs to deliver MPLS-based services will be shouldered with an impossible burden as well.

Accordingly, the undersigned support TelePacific's request for stay of the *2012 Wholesaler-Reseller Clarification Order*. Joint Commenters respectfully submit that the Commission should grant a stay of the service-specific requirements until a date no sooner than one year from the resolution of the underlying Petition for Partial Reconsideration and the pending requests for clarification with respect to MPLS-enabled services.

II. THE COMMISSION SHOULD STAY IMPLEMENTATION OF THE PORTION OF ITS *2012 WHOLESALER-RESELLER CLARIFICATION ORDER* RELATED TO RESELLER CERTIFICATION UNTIL IT HAS DEFINITIVELY ADDRESSED THE UNDERLYING CHALLENGE AND CLARIFIED THE ASSESSABILITY OF MPLS-BASED SERVICES

Joint Commenters fully support the reasoning of TelePacific in its request for a stay pending resolution of its Petition for Partial Reconsideration. If providers reasonably treat some or all of their managed MPLS-based services as information services, or indeed the Commission determines that MPLS is an information service, resellers of inputs to MPLS-based solutions will be faced with the exact harms that TelePacific outlines in its Request. However, as

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[9] *See In the Matter of Universal Service Contribution Methodology, A National Broadband Plan For our Future*, WC Docket No. 06-122, GN Docket No. 09-51, Further Notice of Proposed Rulemaking (rel. Apr. 30, 2012) ("*Contribution Reform FNPRM*") ¶ 41 & n.134 (citing 2009 Guidance Request; Masergy Communications Inc. Petition for Clarification, WC Docket No. 06-122 *et al.*, at 2 (filed Mar. 27, 2009); *In the Matter of Request for Review by XO Communications Services, Inc. of a Decision of the Universal Service Administrator*, WC Docket No. 06-122 (filed Dec. 29, 2010); *In the Matter of Equant, Inc. Request for Review of Decision of the Universal Service Administrator*, WC Docket No. 06-122 (filed Jan. 3, 2012)); *see also* MPLS Industry Group Letter.

described below, absent definitive clarification from the FCC with respect to the assessability of MPLS-based solutions, resellers of inputs to MPLS-enabled services will face distinct harms that only further warrant a stay of the *2012 Wholesaler-Reseller Clarification Order*.

A. Legal Background

The FCC analyzes four factors when determining whether a stay is appropriate: (1) the likelihood of success on the merits of the underlying challenge; (2) the threat of irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) whether a stay will advance the public interest.[10] While "[t]he relative importance of the four criteria will vary depending on the circumstances of the case, . . . a showing of irreparable injury is generally a critical element in justifying a request for stay of an agency order."[11]

The FCC has ruled that harm, to warrant a stay, must be "both certain and great; it must be actual and not theoretical."[12] A petitioner bears the burden of demonstrating that the alleged injury is "certain to occur in the near future."[13] Further, although the Commission has stated that "economic loss does not, by itself, constitute irreparable harm unless it threatens the

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10 *See Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, 23 FCC Rcd 1705, 1706-07 (2008) (citing *Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958)).

11 *See In the Matter of Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MM Docket No. 10-204, File No. CSR-8258, DA 12-1311, Order (rel. Aug. 9, 2012) ("*Tennis Channel*").

12 *See In the Matter of Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket 98-120, Order (rel. Aug. 24, 2012) ¶ 22 (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

13 *See id.*

very existence of the movant's business,"[14] it has also recognized certain instances where economic harm coupled with significant administrative burdens warrant a stay.[15]

In *Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, the FCC's Office of General Counsel ("OGC") granted a limited stay of an order requiring Comcast to provide Tennis Channel on an equal-carriage basis with two other sports-related stations owned by Comcast.[16] In particular, the order concluded that a stay was warranted as to certain Comcast cable systems that served a small proportion of Comcast's subscribers, that did not carry Tennis Channel at the time, and that lacked sufficient bandwidth to launch the network.[17] Comcast noted that if it were to comply with the order, it "likely [would] be required to choose among several highly burdensome alternatives, including making large economic investments to increase channel capacity on many of these systems – investments that [were] not economically feasible and that Comcast would not otherwise make – delaying the launch of new networks, degrading the quality of existing services, or even ceasing to carry some well-established networks altogether."[18] In recognition of these harms, the OGC stayed the implementation of the Order with respect to those cable systems pending Comcast's further appeal of its decision.[19]

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14 *See id.*; *Tennis Channel* ¶ 39.

15 *See Tennis Channel* ¶ 44.

16 *See id.*

17 *See id.*

18 *Id.* ¶ 44.

19 *See id.*

B. Purchasers of Telecommunications Inputs for their MPLS-Enabled Services will Face Irreparable Harm Absent Definitive Clarification from the Commission

In addition to the immediate and irreparable harms ably set forth in TelePacific's Request for Stay,[20] failure to address the underlining uncertainty surrounding the assessability of MPLS-enabled services prior to implementing the *2012 Wholesaler-Reseller Clarification Order* will level unduly burdensome and ultimately unnecessary administrative costs on providers who purchase telecommunications inputs for their MPLS-based services and will put these providers at a competitive cost disadvantage vis-à-vis providers that compete in the same space but can self-provide the inputs.

The Commission has "not formally addressed . . . network services that are implemented with various protocols such as . . . MPLS . . . for purposes for determining USF contribution obligations."[21] As such, in order to determine whether an MPLS-enabled service is subject to USF obligations, a carrier must conduct a fact- and time-intensive, case-by-case review of the Commission's rules, orders, legal definitions, and "Commission precedent concerning the services for transmission inextricably intertwined with information-processing capabilities."[22] As the Commission is well aware, the lack of clarity in the rules has led to industry-wide inconsistency, uncertainty, and confusion.[23] And although it has undertaken to

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20 *See Request for Stay* at 10-13.

21 *See Contribution Reform FNPRM* ¶ 44.

22 *See* Letter from Jennifer McKee, Acting Chief of the Telecommunications Access Policy Division of the FCC's Wireline Competition Bureau, to Michele Tilton, Director of Financial Operations of the Universal Service Administrative Corporation ("USAC") (Apr. 1, 2009) ("Guidance Letter").

23 *See* FNPRM ¶ 38 ("The question of whether certain enterprise communications services are currently assessable as telecommunications services or non-assessable as information services has led to significant disputes, uncertainty, and incentives for providers to attempt to characterize their services in a particular way in order to avoid contribution requirements, resulting in a pending request for guidance from USAC regarding the treatment of such services.").

address this issue through its recent *Contribution Reform FNPRM*, the FCC has yet to resolve the vital, threshold questions surrounding MPLS contribution obligations.

Under the current framework, Joint Commenters cannot reasonably implement the certification requirements of the *2012 Wholesaler-Reseller Order* absent further guidance from the Commission. Transitioning into a service-by-service reseller certification model would require a comprehensive and continuous analysis of a vast landscape of IP-enabled services for delivery of managed services under complex, long-term enterprise contracts that have significant bespoke components and which mutate and change over the life of the contract as technology and complex enterprises' needs change. Internally, it would involve coordination between legal, billing, sales, finance, sourcing and products teams within the US and internationally. In addition, implementation would require costly and complex technical changes to billing, reporting and administrative systems—in some cases requiring entirely new systems. Externally, it would require substantial coordination and negotiation among wholesalers, resellers, and end-users to determine how to treat the various IP-enabled services that are offered to end users. And yet, the FCC has provided no indication of how carriers *should* classify these services for USF purposes, rendering the entire process little more than expensive guesswork. Moreover, if after carriers have implemented these new systems the FCC reaches its long-overdue resolution, providers face uncertain effects to implement the ruling. Indeed, those providers would then be forced to perform the analysis, redesign billing, reporting and administrative systems, and negotiate with third parties all over again.

As in *Tennis Channel*, premature implementation of the *2012 Wholesaler-Reseller Order* would place Joint Commenters in an impossible situation: designing a mandated service-by-service certification system with unclear guidance from the FCC and the strong possibility of

necessary wholesale redesign.[24] Further, similar to *Tennis Channel*, the administrative costs required to undertake a service-by-service review -- particularly in the large global enterprise network services market which is characterized by complex, bespoke, long-term and evolving contracts --which Joint Commenters would not otherwise undertake, will divert significant resources from other important operations. This likely will have the effect of delaying investment in advanced service products, degrading customer service and sales operations, and requiring significant legal costs to navigate through the current MPLS and reseller rules.

Therefore, the Commission should grant a stay of the *2012 Wholesaler-Reseller Clarification Order* while it addresses the underlying issues. Further, because implementing any new system will require substantial effort, this stay should provide sufficient time—*after* resolution of the pending classification issues—for carriers to anticipate, budget, and implement any new system.[25] Indeed, as other providers have indicated, a January 1, 2014 implementation date would be feasible "only if [the Commission] commits to issuing specific guidance well in

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24 Indeed, an earlier order in the *Tennis Channel* proceedings explicitly recognized these harms as warranting a stay of the ALJ's Initial Decision pending Commission review. *See In the Matter of Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MM Docket No. 10-204, File No. CSR-8258-P, FCC 12-50, Order (rel. May 14, 2012) ¶ 5 ("If we compel immediate compliance, Comcast would be required to implement the carriage remedy without guidance on compensation, a matter that the parties dispute, and it may have to undertake multiple channel realignments to implement the channel placement remedy. . . . . A stay will preserve the status quo while the Commission has an adequate opportunity to examine the record and the ALJ's disposition of each issue closely, and it will avoid potential disruption to consumers and any affected third-party programmers in the event that the Commission subsequently reverses or modifies the ALJ's remedy. . . . Under these circumstances, we find that grant of a stay for administrative reasons is equitable and will serve the public interest.").

25 *See Request for Stay* at 4 n.8 (citing Joint Letter from Michael Saperstein, Director Federal Regulatory Affairs of Frontier Communications, Nancy Lubamerksy, VP Public Policy and Strategic Initiatives of U.S. TelePacific Corp. d/b/a TelePacific Communications, and Malena Barzilai, Senior Government Affairs Counsel, Windstream to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122 (filed Aug. 20, 2012).

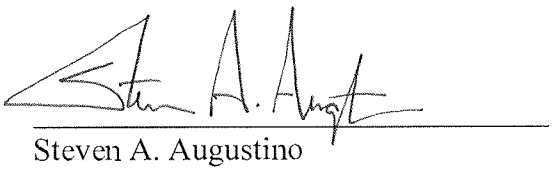
advance of the target date."[26] For this reason, Joint Commenters propose a stay ending no earlier than one year after definitively clarifying the assessability of MPLS-enabled services and resolving the underlying Petition for Partial Reconsideration.

III. CONCLUSION

For the preceding reasons, Joint Commenters respectfully request a stay of the *2012 Wholesaler-Reseller Clarification Order* until a date no earlier than one year following the resolution of the underlying petition, the pending *Contribution Reform FNPRM*, and all pending guidance letters and appeals relating to the contribution obligations of providers of MPLS-enabled services.

Respectfully submitted,

BT AMERICAS INC. ON BEHALF OF ITSELF AND ITS U.S. AFFILIATES ORANGE BUSINESS SERVICES US, INC. BCE NEXXIA CORP.



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26 *See* Letter from Alan Buzacott, Executive Director, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket 06-122 (filed Oct. 24, 2012) at 1-2.